

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

PAUL FELCH,	)	
	)	No. CV-05-0148-CI
Plaintiff,	)	
	)	ORDER DENYING PLAINTIFF'S
v.	)	MOTION FOR SUMMARY JUDGMENT
	)	AND DIRECTING ENTRY OF
JO ANNE B. BARNHART,	)	JUDGMENT FOR DEFENDANT
Commissioner of Social	)	
Security,	)	
	)	
Defendant.	)	
	)	

BEFORE THE COURT are cross-Motions for Summary Judgment (Ct. Rec. 9, 13) submitted for disposition without oral argument on December 12, 2005. Attorney Lora Lee Stover represents Plaintiff; Special Assistant United States Attorney David R. Johnson represents Defendant. The parties have consented to proceed before a magistrate judge. (Ct. Rec. 2.) After reviewing the administrative record and the briefs filed by the parties, the court **DENIES** Plaintiff's Motion for Summary Judgment and directs entry of judgment for Defendant.

Plaintiff, 42-years-old at the time of the administrative decision, filed a second application for Social Security disability on March 13, 2002, alleging disability as of January 1, 1999, due to

1 irregular heart rhythm. (Tr. at 20.) Plaintiff had less than a  
2 high-school education and past relevant work as a self-employed  
3 landscape worker. Following a denial of benefits at the initial  
4 stage and on reconsideration, a hearing was held before  
5 Administrative Law Judge Mary B. Reed (ALJ). The ALJ denied  
6 benefits; review was denied by the Appeals Council. This appeal  
7 followed. Jurisdiction is appropriate pursuant to 42 U.S.C. §  
8 405(g).

#### 9 ADMINISTRATIVE DECISION

10 The ALJ concluded that Plaintiff had a limited education and  
11 his landscaping work after the alleged onset date did not constitute  
12 substantial gainful activity. (Tr. at 20, 21.) Plaintiff was found  
13 insured for disability benefits through the date of the ALJ's  
14 decision. Plaintiff suffered from cardiac arrhythmias and atrial  
15 fibrillation with implantation of a pacemaker, musculoskeletal pain  
16 associated with implantation of the pacemaker, and gastroesophageal  
17 reflux disease (GERD). (Tr. at 26.) The impairments were not found  
18 to meet the Listings. The ALJ rejected Plaintiff's testimony as not  
19 fully credible. (Tr. at 27.) The ALJ concluded Plaintiff retained  
20 the residual capacity to perform a limited range of light exertion  
21 and was precluded from performing past relevant work. Plaintiff was  
22 found to be able to perform other work such as assembler, hand  
23 packager, and packaging and filling machine operator. (Tr. at 31.)  
24 The ALJ concluded Plaintiff was not disabled.

#### 25 ISSUES

26 The question presented is whether there was substantial  
27 evidence to support the ALJ's decision denying benefits and, if so,  
28 whether that decision was based on proper legal standards.

1 Plaintiff contends the ALJ improperly (1) assessed his residual  
2 functional capacity and pain complaints in light of the findings of  
3 the agency's expert, Dr. Robert A. Stier; (2) rejected Plaintiff's  
4 testimony as not credible; and (3) posed an inaccurate and  
5 incomplete hypothetical to the vocational expert.

#### 6 STANDARD OF REVIEW

7 In *Edlund v. Massanari*, 253 F.3d 1152, 1156 (9<sup>th</sup> Cir. 2001), the  
8 court set out the standard of review:

9 The decision of the Commissioner may be reversed only if  
10 it is not supported by substantial evidence or if it is  
11 based on legal error. *Tackett v. Apfel*, 180 F.3d 1094,  
12 1097 (9th Cir. 1999). Substantial evidence is defined as  
13 being more than a mere scintilla, but less than a  
14 preponderance. *Id.* at 1098. Put another way, substantial  
15 evidence is such relevant evidence as a reasonable mind  
16 might accept as adequate to support a conclusion.  
17 *Richardson v. Perales*, 402 U.S. 389, 401 (1971). If the  
18 evidence is susceptible to more than one rational  
19 interpretation, the court may not substitute its judgment  
20 for that of the Commissioner. *Tackett*, 180 F.3d at 1097;  
21 *Morgan v. Comm'r of Soc. Sec. Admin.* 169 F.3d 595, 599  
(9th Cir. 1999).

22 The ALJ is responsible for determining credibility,  
23 resolving conflicts in medical testimony, and resolving  
24 ambiguities. *Andrews v. Shalala*, 53 F.3d 1035, 1039 (9th  
25 Cir. 1995). The ALJ's determinations of law are reviewed  
26 *de novo*, although deference is owed to a reasonable  
27 construction of the applicable statutes. *McNatt v. Apfel*,  
28 201 F.3d 1084, 1087 (9th Cir. 2000).

#### 21 SEQUENTIAL PROCESS

22 Also in *Edlund*, 253 F.3d at 1156-1157, the court set out the  
23 requirements necessary to establish disability:

24 Under the Social Security Act, individuals who are  
25 "under a disability" are eligible to receive benefits. 42  
26 U.S.C. § 423(a)(1)(D). A "disability" is defined as "any  
27 medically determinable physical or mental impairment"  
28 which prevents one from engaging "in any substantial  
gainful activity" and is expected to result in death or  
last "for a continuous period of not less than 12 months."  
42 U.S.C. § 423(d)(1)(A). Such an impairment must result  
from "anatomical, physiological, or psychological

1 abnormalities which are demonstrable by medically  
 2 acceptable clinical and laboratory diagnostic techniques." 42 U.S.C. § 423(d)(3). The Act also provides that a  
 3 claimant will be eligible for benefits only if his  
 4 impairments "are of such severity that he is not only  
 5 unable to do his previous work but cannot, considering his  
 6 age, education and work experience, engage in any other  
 kind of substantial gainful work which exists in the  
 national economy . . . ." 42 U.S.C. § 423(d)(2)(A).  
 Thus, the definition of disability consists of both  
 medical and vocational components.

7 In evaluating whether a claimant suffers from a  
 8 disability, an ALJ must apply a five-step sequential  
 9 inquiry addressing both components of the definition,  
 10 until a question is answered affirmatively or negatively  
 11 in such a way that an ultimate determination can be made.  
 12 20 C.F.R. §§ 404.1520(a)-(f), 416.920(a)-(f). "The  
 13 claimant bears the burden of proving that [s]he is  
 14 disabled." *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir.  
 1999). This requires the presentation of "complete and  
 detailed objective medical reports of h[is] condition from  
 licensed medical professionals." *Id.* (citing 20 C.F.R. §§  
 404.1512(a)-(b), 404.1513(d)).

## 14 ANALYSIS

### 15 1. Dr. Stier's Opinion

16 Plaintiff contends the ALJ's conclusions are in conflict with  
 17 the opinion rendered by consultant Dr. Robert A. Stier, who  
 18 testified at the hearing on behalf of Defendant. Defendant notes  
 19 Dr. Stier testified Plaintiff's pacemaker was doing "admirably  
 20 well," that his electrocardiograph was within normal limits, and  
 21 that if Plaintiff did not overexert, he would do "all right." (Tr.  
 22 at 544-548.) Defendant further notes Dr. Stier stated Plaintiff  
 23 could occasionally lift and carry 20 pounds, frequently lift ten  
 24 pounds, should avoid hazardous machinery, exposure to high magnetic  
 25 or electrical fields, and pulmonary irritants. (Tr. at 551-552.)

26 Dr. Stier, who testified at the administrative hearing, was a  
 27 consulting physician whose opinion was based on his review of  
 28 Plaintiff's medical records. (Tr. at 543.) Dr. Stier noted

1 Plaintiff had "all kinds" of physical impairments, including  
2 palpitations and injury of his right shoulder. (Tr. at 545.)  
3 Chronic and increasing flutter fibrillation lead to the installation  
4 of a heart pacemaker in 2002. Dr. Stier noted the onset of  
5 Plaintiff's flutter fibrillation was gradual, beginning in January  
6 1999, and becoming sufficiently serious and permanent in late 2001,  
7 early 2002 to require a pacemaker. (Tr. at 555-556.) His post  
8 pacemaker echocardiograms were within normal limits. Plaintiff also  
9 had a history of hypothyroidism and GERD, childhood asthma no longer  
10 symptomatic except with exposure to some irritants, and residual  
11 pain and swelling from a right shoulder injury. (Tr. at 549.)

12 Dr. Stier noted Plaintiff had a cap on his ability to engage in  
13 exertional activity because of the pacemaker limitations. He  
14 further stated Plaintiff could occasionally lift 50 pounds,  
15 frequently lift 20 pounds but carry it only short distances, sit for  
16 six of eight hours, and stand and walk six of eight hours with  
17 intermittent rest periods. Plaintiff would be limited in climbing  
18 ropes, stairs or ladders, should avoid situations where sudden  
19 exertion is involved, and not be around hazardous machinery or  
20 machinery with a high magnetic field. (Tr. at 550-552.)

21 The ALJ considered Dr. Stier's opinion and noted:

22 Robert A. Stier, M.D., an internist, appeared and  
23 testified at the hearing as a medical expert. He  
24 testified that his review of the medical evidence of  
25 record, considered in its entirety, established that the  
26 claimant had a history of right shoulder injury and a  
27 history of intermittent atrial flutter, with EKGs within  
28 normal limits. On exercise testing in 1997, flutter  
showed up after 11 minutes and at rest. The claimant was  
put on a Beta Blocker and then underwent pacemaker  
implantation in 2002, with subsequent ablation. All  
physical examinations have shown lungs clear, no heart  
murmurs or abnormal sounds, and no edema. The claimant  
reported chest pain with exercise, but there was no

1 evidence of coronary insufficiency and no elevated cardiac  
2 enzymes. The claimant suffers from arrhythmias with good  
3 left ventricular function. The claimant also suffers from  
4 mild gastroesophageal reflux disease, improved with  
5 medications, and he experiences some swelling of the  
6 supraclavicular area associated with inflammation of the  
7 packet containing the pacemaker. The claimant was  
8 considered to be able to lift 50 pounds occasionally and  
9 20 pounds frequently, sit six hours in an eight hour work  
10 day, stand and walk less than six hours in an eight hour  
11 work day (although the stress test indicates the claimant  
12 could stand walk six hours in an eight hour workday). The  
claimant was unable to climb ropes, ladders, or scaffolds,  
or engage in activities requiring sudden exertion or  
exposure to quick moving machinery, exposure to hazards or  
dangerous machinery, or exposure to high magnetic or  
electric fields or microwaves. He could occasionally  
climb stairs and ramps. The record also evidenced that  
the claimant had a short history of childhood asthma,  
without recurrence. If the claimant's asthma recurred  
(although the record does not evidence that it is  
present), the claimant would also avoid exposure to cold,  
humidity and dust.

13 (Tr. at 25-26.) Thus, the ALJ considered all of the limitations  
14 observed by Dr. Stier.

15 In posing the hypothetical to the vocational expert, the ALJ  
16 further reduced the lifting and carrying weights to 20 pounds  
17 occasionally and ten pounds frequently. (Tr. at 614.) Based on  
18 these limitations, the expert concluded Plaintiff could perform a  
19 limited range of sedentary and light work, including specific jobs  
20 which were available in significant numbers in the national economy.  
21 (Tr. at 614.) Having included all of the limitations described by  
22 Dr. Stier, there was no error when the ALJ concluded Plaintiff was  
23 not disabled.<sup>1</sup>

24  
25 <sup>1</sup>Plaintiff has not challenged Dr. Stier's testimony as being  
26 inconsistent with other evidence in the medical record. (Ct. Rec.  
27 11 at 10.) This court's review of the medical record does not  
28 disclose any inconsistencies as to Dr. Stier's opinion.

1 **2. Credibility**

2 Plaintiff contends the ALJ erred when he rejected his testimony  
3 as not credible. The ALJ noted in her opinion:

4 The claimant was not considered to be credible. The  
5 record reflects many inconsistencies, particularly  
6 concerning the claimant's work activity. The claimant has  
7 variously reported that he ceased working in January of  
8 1999, in January of 2001, in April of 2002, and he  
9 reported that, in 2003, he was limited to driving his wife  
10 and son to the lawn jobs. The claimant reported he had to  
11 turn down work due to his inability to perform his job,  
12 however, the claimant's tax returns and his Earnings  
13 Record indicate that the claimant's self-employment income  
14 increased after 1999. Although the claimant reported that  
15 he was unable to continue to assist with snow removal in  
16 2001, it is noted that he purchased two more lawn mowers  
17 and a snow blower in 2001. The claimant's reports to  
18 physicians concerning his work activity are inconsistent  
19 with his statements made in conjunction with his pursuit  
20 of benefits. These conflicts are detailed above in this  
21 decision. It is noted that the claimant has reported that  
22 his wife and son did all of the labor, however, his wife  
23 was also employed during a period of time at issue. It is  
24 also noted that the claimant testified he had a history of  
25 being paid "under the table" for his work activity, and  
26 that he received welfare benefits in some years. The  
27 claimant's statements concerning his use of alcohol are  
28 inconsistent with medical records evidencing persisting  
use of alcohol, associated with abdominal pain. The  
claimant's reports concerning his education are not  
supported by the school records. The claimant's  
statements of severe fatigue precluding his ability to  
perform any exertion are inconsistent with the claimant's  
ability to continue to hunt and hike and with the medical  
records and are unsupported by the results of thorough  
evaluations. On treadmill testing in September of 2001,  
the claimant exercised 11 minutes, stopping only due to  
leg fatigue. Treadmill testing in February of 2002 was  
reported to be normal, as well. The claimant reports  
worsening symptoms, however, he was released by his  
cardiologist on July 22, 2002, with no follow-up visit  
scheduled.

24 The record evidences that the claimant reported that his  
25 chest pain had resolved in April of 1998 and he alleges  
26 that he became disabled on January 1, 1999 or on January  
27 28, 2001, although the record does not evidence a change  
28 in condition after April of 1998 and the claimant did not  
seek any medical care between April of 1998 and August of  
2001, other than treatment for gastroesophageal reflux  
symptoms associated with consuming alcohol in July of  
1999. The claimant reported he ceased work activity in

1 April of 2002, apparently coincident with implantation of  
2 the pacemaker on April 12, 2002. However, the claimant  
3 himself reports improvement in his symptoms following  
4 surgery, and the treating specialists all reported  
5 significant improvement in the claimant's condition  
6 following the surgery. It is noted that the claimant's  
7 chest discomfort was attributed to gastroesophageal reflux  
8 which was also associated with continued chocolate  
9 consumption, although the claimant was chocolate  
10 intolerant and lactose intolerant. The claimant's  
11 gastroesophageal reflux symptoms were also associated with  
12 consumption of alcohol, recurring primarily with use of  
13 alcohol. Although the claimant has reported tiredness  
14 with any activity, treadmill testing did not support this  
15 significant exercise intolerance. The claimant's  
16 statements concerning the frequency and duration of his  
17 symptoms are inconsistent. The claimant's reported  
18 functional restrictions, including his inability to walk  
19 more than 1 hour, stand more than 2 hours or sit more than  
20 3 hours, are inconsistent with his ability to continue to  
21 hunt, camp and hike. Observations by an examining  
22 physician in July of 2001 that the claimant's hands were  
23 calloused with ground in dirt are inconsistent with his  
24 statements concerning his inability to perform any work.  
25 In July of 2001, the claimant reported he had last seen  
26 Dr. Orme, his treating physician, more than one year ago,  
27 and the following month, on presentation to Dr. Orme, it  
28 was noted it had been two years since the claimant had  
presented to Dr. Orme.

16 The claimant's presentation to physicians has been  
17 primarily coincident with his pursuit of Social Security  
18 benefits. The claimant first presented with symptoms in  
19 1996, followed by extensive evaluation, and reported  
20 resolution of symptoms by April of 1998. The claimant did  
21 not return to a physician thereafter, other than for  
22 treatment of exacerbation of gastroesophageal symptoms  
23 associated with consuming alcohol, until subsequent to  
24 filing an application for benefits in June of 2001. At  
25 that time, the claimant underwent a consultative  
26 examination, after which he finally returned to a treating  
27 physician, Dr. Orme, for the first time in two years. The  
28 claimant underwent evaluation and he, again, did not  
followup subsequent to September of 2001 and prior to  
filing another application for Social Security benefits.  
The claimant's failure to seek treatment during that time  
is inconsistent with his varying reports of significant  
worsening of his symptoms such that he became unable to  
sustain activity, even simply driving the truck,  
throughout a workday.

(Tr. at 27, 28 (references to exhibits omitted).)

In deciding whether to admit a claimant's subjective symptom

1 testimony, the ALJ must engage in a two-step analysis. *Smolen v.*  
2 *Chater*, 80 F.3d 1273, 1281 (9th Cir. 1996). Under the first step,  
3 see *Cotton v. Bowen*, 799 F.2d 1403, 1405 (9th Cir. 1986), the  
4 claimant must produce objective medical evidence of underlying  
5 "impairment," and must show that the impairment, or a combination of  
6 impairments, "could reasonably be expected to produce pain or other  
7 symptoms." *Id.* at 1281-82. If this test is satisfied, and if there  
8 is no evidence of malingering, then the ALJ, under the second step,  
9 may reject the claimant's testimony about severity of symptoms with  
10 "specific findings stating clear and convincing reasons for doing  
11 so." *Id.* at 1284. The ALJ may consider the following factors when  
12 weighing the claimant's credibility: "[claimant's] reputation for  
13 truthfulness, inconsistencies either in [claimant's] testimony or  
14 between [his/her] testimony and [his/her] conduct, [claimant's]  
15 daily activities, [his/her] work record, and testimony from  
16 physicians and third parties concerning the nature, severity, and  
17 effect of the symptoms of which [claimant] complains." *Light v. Soc.*  
18 *Sec. Admin.*, 119 F.3d 789, 792 (9th Cir. 1997). If the ALJ's  
19 credibility finding is supported by substantial evidence in the  
20 record, the court may not engage in second-guessing. See *Morgan v.*  
21 *Comm'r of Soc. Sec. Admin.*, 169 F.3d 595, 600 (9th Cir. 1999). If  
22 a reason given by the ALJ is not supported by the evidence, the  
23 ALJ's decision may be supported under a harmless error standard.  
24 *Curry v. Sullivan*, 925 F.2d 1127, 1131 (9th Cir. 1990) (applying the  
25 harmless error standard); *Booz v. Sec'y of Health and Human Serv.*,  
26 734 F.2d 1378, 1380 (9th Cir. 1984) (same). There is no evidence of  
27 malingering; thus, Plaintiff's testimony must be rejected with clear  
28 and convincing reasons. Additionally, there is objective evidence

1 to support diagnoses of heart impairment and GERD; both could be  
2 reasonably expected to produce symptoms of pain and fatigue. Thus,  
3 the first prong of *Smolen* has been satisfied.

4 Plaintiff does not offer this court any specific argument as to  
5 which of the credibility findings were not supported by the record.  
6 (Ct. Rec. 11 at 14.) Plaintiff contends he suffers from a decreased  
7 ability to concentrate and maintain activity over time; yet there  
8 are no objective psychological records to support that contention.  
9 Based on Dr. Stier's assessment, although Plaintiff suffers from a  
10 serious heart impairment, his condition has stabilized with the  
11 insertion of a pacemaker. None of his treating physicians have  
12 opined he is disabled.

13 Here, the ALJ relied on Plaintiff's inconsistent report of his  
14 work history, the fact no treating physician concluded he was fully  
15 disabled, medical records which indicated his heart condition had  
16 stabilized with treatment, the lack of ongoing medical treatment  
17 during the period of alleged disability, and Plaintiff's reported  
18 daily activities. The record supports the ALJ's conclusion  
19 Plaintiff's work history was inconsistent as to the date he was  
20 unable to work. Plaintiff reported he was using the weed whacker  
21 and mowing lawns in 2000, 2001, that he took time off to heal after  
22 insertion of the pacemaker in 2002, but had improved since then.  
23 (Tr. at 573-586.) He reported to Dr. Rubin in 2001 that he was  
24 involved in mowing 16 lawns in one day. (Tr. at 356.) Plaintiff  
25 continued to hunt, fish, did housework, laundry and vacuuming, and  
26 cut wood for his personal use. (Tr. at 576, 587, 589.) Plaintiff  
27 also reported he was paid "under the table" while collecting welfare  
28 benefits. (Tr. at 604-605.) Objective medical tests following the

1 insertion of the pacemaker were normal and no follow-up medical care  
2 was required. (Tr. at 410, 484, 497.) Plaintiff did not visit a  
3 cardiologist for two years during the alleged period of disability.  
4 (Tr. at 440.) Thus, Plaintiff's daily activities, the objective  
5 medical evidence, and inconsistent statements provide clear and  
6 convincing reasons to reject Plaintiff's testimony as not fully  
7 credible. Accordingly,

8 **IT IS ORDERED:**

9 1. Plaintiff's Motion for Summary Judgment (**Ct. Rec. 9**) is  
10 **DENIED.**

11 2. Defendant's Motion for Summary Judgment dismissal (**Ct. Rec.**  
12 **13**) is **GRANTED**; Plaintiff's Complaint and claims are **DISMISSED WITH**  
13 **PREJUDICE.**

14 3. The District Court Executive is directed to file this Order  
15 and provide a copy to counsel for Plaintiff and Defendant. The file  
16 shall be **CLOSED** and judgment entered for Defendant.

17 DATED January 17, 2006.

18  
19 S/ CYNTHIA IMBROGNO  
20 UNITED STATES MAGISTRATE JUDGE  
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